SEE KEK CHUAN A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
ABDUL MALIK ISHAK JCA
AZAHAR MOHAMED JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPEAL NO: B-05-106-2011]
8 MAY 2013 C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Conviction and sentence - Appeal against - Prosecution's assertion that accused was found with dangerous drugs while apprehended in hotel lobby - Conflicting testimony of events from witnesses - Whether CCTV footage* D *tendered to support conflicting versions of events - Whether failure to produce material evidence amounts to withholding or suppression of evidence - Adverse inference - Whether rightly invoked against prosecution - Whether High Court judge erred in his decision*

CRIMINAL PROCEDURE: *Disclosure of information - Documents - Criminal Procedure Code, s. 51A - Non-compliance - Whether s. 422 Criminal Procedure Code could be invoked* E

EVIDENCE: *Adverse inference - CCTV recording - Failure of prosecution to tender CCTV recording - Accused charged with trafficking* F *in dangerous drugs - Movements of accused from his car to hotel lobby carrying black bag containing dangerous drugs - Conflicting testimony of events - Whether CCTV footage tendered to support conflicting versions of events - Whether failure to produce material evidence amounts to withholding or suppression of evidence - Whether adverse inference rightly* G *invoked against prosecution*

This was an appeal against the decision of the High Court in convicting and sentencing the appellant for the offence committed under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). H Based on the facts, it was ASP Loi Yew Lik's ('PW3') testimony that he had witnessed the appellant, who was alone, alighting from his car whilst carrying a black bag and walked towards the Sunway Resort & Spa Hotel ('the hotel'). When PW3 approached the appellant, the latter was still holding on to the black bag. I Upon inspection, PW3 found ten packages in the black bag which

were filled with white powder, thereafter confirmed to be ketamine. The appellant's version however, was that when he alighted from his car with one Ah Fatt who had followed him in the car, the said Ah Fatt had taken the bag from the car and when they both were about to enter the hotel, a group of people came from the front. At the same time, Ah Fatt threw the bag down and fled the scene, leaving the appellant alone. The group of people, who later identified themselves as police officers, took the bag and arrested the appellant. According to the appellant, he told the police that the bag belonged to Ah Fatt. During cross-examination, the security officer of the hotel ('PW4') testified that the police was given a copy of the closed circuit television ('CCTV') tape but on the contrary, it was the testimony of the hotel's director of security and safety ('PW9') that no request was made by the police for a copy of the CCTV footage. The High Court Judge accepted the prosecution's version as credible and convicted the appellant. Dissatisfied, the appellant appealed to this court. It was the appellant's contention that the High Court Judge erred in not invoking s. 114(g) of the Evidence Act 1950 ('the Act') when the prosecution failed to produce the CCTV footage.

Held (allowing appeal; setting aside decision of High Court) Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) Section 51A of the Criminal Procedure Code ('CPC') makes reference to the delivery of certain documents to the appellant by the prosecution and it is still in its infancy stage. It relates to pre-trial disclosure of evidence by the prosecution. If documents are not supplied to the defence in accordance with s. 51A, the prosecution is not barred from tendering those documents and the defence may be given time to study those documents. (para 20)

(1a) In the event the prosecution fails to comply with the provisions of s. 51A of the CPC, the prosecution's case would be jeopardised if the trial court refuses to condone the non-compliance by the prosecution of s. 51A. Further, s. 422 of the CPC may not assist the prosecution if the non-compliance to s. 51A of the CPC is material. (para 20)

(2) Being a piece of material evidence, the CCTV footage was not produced and tendered by the prosecution. The importance of the CCTV footage could not be doubted since it would clear the lingering doubt of whether Ah Fatt carried the black bag and threw it on the floor and bolted at the lobby of the hotel. Further, the CCTV footage would have verified the prosecution's version. Had the CCTV footage been produced, the High Court Judge would be in a better position to verify the prosecution's version. The non-production of the CCTV footage amounted to a withholding or suppression of evidence and if it was produced, it would be unfavourable to the prosecution and consequently, the adverse presumption under s. 114(g) of the Act must be invoked against the prosecution. (paras 29, 33, 36, 44 & 48)

(3) Illustration (g) of s. 114 of the Act is based on the maxim *omnia praesumuntur contra spoliatorem* (if a man wrongfully withholds evidence, the court can draw every presumption to his disadvantage, consistent with the facts admitted or proved). The best evidence rule governs the production of evidence in court and when it is withheld, it is only fair to presume that the party withholding the evidence had some ulterior motive in not producing it and if produced, would be detrimental to that party and that attracted the adverse inference provision. (para 38)

(4) Contrary to the evidence of PW4, PW9 testified that the CCTV recording was not given to the police because there was no written request made by the police for a copy of the same. Since the police did not record PW9's statement, there was no opportunity for the prosecution to impeach PW9's credit. Further, the High Court Judge accepted the persecution's version as credible notwithstanding the fact that the CCTV footage was not tendered and the two contradictory or variant narratives of PW4 and PW9 with regard to the CCTV footage introduced two sets of evidence for the prosecution. (paras 32 & 39)

(5) When the prosecution evidence admits two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is

favourable to the accused. Further, appellate intervention is called for when the inferences by the trial court were not supported by the weight of evidence. From the facts, the prosecution failed to prove its case beyond reasonable doubt. (paras 45 & 48)

Bahasa Malaysia *Translation Of Headnotes*

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi dalam mensabitkan dan menjatuhkan hukuman ke atas perayu di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Berdasarkan fakta, adalah keterangan ASP Loi Yew Lik ('PW3') bahawa dia telah melihat perayu, yang bersendirian, turun daripada keretanya sambil membawa sebuah beg berwarna hitam bersamanya dan menuju ke arah Hotel Sunway Resort & Spa ('hotel'). Apabila PW3 menghampiri perayu, perayu masih memegang beg hitam tersebut. Atas pemeriksaan, PW3 telah menjumpai sepuluh bungkusan di dalam beg hitam tersebut yang dipenuhi dengan serbuk putih, kemudiannya disahkan sebagai Ketamine. Versi perayu, walau bagaimanapun, adalah bahawa apabila dia turun daripada keretanya bersama seorang yang bernama Ah Fatt, Ah Fatt tersebut telah mengambil beg tersebut daripada kereta dan sebaik sahaja mereka memasuki hotel, sekumpulan orang telah datang dari arah depan. Pada masa yang sama, Ah Fatt mencampak beg tersebut ke bawah dan lari meninggalkan perayu seorang diri. Sekumpulan orang tersebut, yang kemudiannya memperkenalkan diri mereka sebagai pihak polis, telah mengambil beg tersebut dan menangkap perayu. Menurut perayu, dia telah memberitahu polis bahawa beg tersebut dimiliki oleh Ah Fatt. Semasa pemeriksaan balas, pegawai pengawal hotel ('PW4') telah memberi keterangan bahawa polis telah diberikan salinan rakaman televisyen litar tutup ('CCTV') tetapi sebaliknya, adalah menjadi keterangan pengarah pengawal dan keselamatan hotel ('PW9') bahawa tiada permintaan dibuat oleh pihak polis untuk mendapatkan salinan rakaman CCTV. Mahkamah Tinggi telah menerima versi pihak pendakwaan sebagai boleh dipercayai dan mensabitkan perayu. Tidak berpuas hati, perayu merayu ke mahkamah ini dan adalah menjadi hujahan perayu bahawa hakim Mahkamah Tinggi khilaf kerana tidak membangkitkan s. 114(g) Akta Keterangan 1950 ('Akta') apabila pihak pendakwaan gagal mengemukakan rakaman CCTV tersebut.

Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 51A Kanun Tatacara Jenayah ('KTJ') membuat rujukan kepada penyerahan sesuatu dokumen kepada perayu oleh pihak pendakwaan dan masih berada pada peringkat permulaan. Ia berkaitan dengan pengemukaan keterangan oleh pendakwaan semasa pra-perbicaraan. Jika dokumen-dokumen tidak dibekalkan kepada pembelaan berikutan s. 51A, pihak pendakwaan tidak dihalang daripada mengemukakannya dan pembelaan akan diberi masa untuk menyelidik dokumen-dokumen tersebut.

(1a) Adalah relevan untuk menyatakan bahawa dalam keadaan di mana pendakwaan gagal mematuhi peruntukan s. 51A KTJ, pihak pendakwaan akan diancam jika mahkamah bicara enggan membiarkan ketidakpatuhan s. 51A oleh pihak pendakwaan. Tambahan lagi, s. 422 KTJ tidak dapat membantu pendakwaan jika ketidakpatuhan s. 51A KTJ adalah material.

(2) Sebagai keterangan material, rakaman CCTV tidak dikemukakan oleh pendakwaan. Kepentingan rakaman CCTV tidak boleh diragui kerana ia akan menjelaskan sama ada Ah Fatt membawa beg hitam dan mencampaknya ke lantai dan melarikan diri dari lobi hotel. Tambahan lagi, rakaman CCTV boleh mengesahkan versi pihak pendakwaan. Jika rakaman CCTV dikemukakan, hakim Mahkamah Tinggi mungkin berada dalam kedudukan yang lebih baik untuk mengesahkan versi pihak pendakwaan. Kegagalan mengemukakan rakaman CCTV menyebabkan suatu penahanan atau penindasan keterangan dan jika dikemukakan, mungkin tidak akan menyokong pihak pendakwaan dan oleh itu, anggapan bertentangan di bawah s. 114(g) Akta mesti dibangkitkan terhadap pendakwaan.

(3) Illustrasi (g) s. 114 Akta adalah berdasarkan maxim *omnia praesumuntur contra spoliatorem* (jika seseorang menahan keterangan, mahkamah boleh membuat anggapan terhadap kekurangannya, konsisten dengan fakta yang dibenarkan atau dibuktikan). Kaedah keterangan terbaik menentukan

pengemukaan keterangan di mahkamah dan apabila ia ditahan, adalah adil untuk menganggap bahawa pihak yang menahan keterangan tersebut mempunyai niat tersembunyi dalam tidak mengemukakannya dan jika dikemukakan, ia akan merugikan pihak tersebut dan boleh membangkitkan peruntukan anggapan bertentangan.

(4) Bertentangan dengan keterangan PW4, PW9 memberi keterangan bahawa rakaman CCTV tidak diberikan kepada pihak polis kerana tiada permintaan bertulis dibuat oleh pihak polis untuk salinan rakaman tersebut. Memandangkan pihak polis tidak merekod kenyataan SP9, tiada peluang bagi pihak pendakwaan untuk mencabar kebolehpercayaan SP9. Tambahan lagi, hakim Mahkamah Tinggi telah menerima versi pihak pendakwaan sebagai boleh dipercayai walaupun rakaman CCTV tidak dikemukakan dan dua keterangan bertentangan dari PW4 dan PW9 telah memperkenalkan dua set keterangan bagi pihak pendakwaan.

(5) Apabila keterangan pendakwaan menerima dua atau lebih inferens, satu daripadanya yang memihak tertuduh, maka adalah tugas mahkamah untuk membuat inferens yang memihak tertuduh. Tambahan lagi, campurtangan rayuan diperlukan apabila inferens daripada mahkamah perbicaraan tidak disokong oleh beban keterangan. Berdasarkan fakta, pihak pendakwaan telah gagal untuk membuktikan kesnya melampaui keraguan yang munasabah.

Case(s) referred to:

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***

Adzhaar Ahmad & Anor v. PP [1996] 1 LNS 68 HC ***(refd)***

Azahan Mohd Aminallah v. PP [2005] 1 CLJ 374 CA ***(refd)***

Brown v. Stott [2001] SC (PC) 43 ***(refd)***

Cheak Yoke Thong v. PP [1984] 2 CLJ 83; [1984] 1 CLJ (Rep) 87 FC ***(refd)***

Chua Kim Suan v. Ang Mek Chong [1988] 3 MLJ 231 ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***

Eastern & Oriental Hotel [1951] Sdn Bhd v. Ellarlous George Fernandez & Anor [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50 SC ***(refd)***

Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***

Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 SC ***(refd)***

Harchand Singh & Anor v. State of Haryana [1974] AIR 344 ***(refd)***

Harjit Singh Mann v. S Umrao Singh And Others [1980] AIR 701 SC ***(refd)***

Jazuli Mohsin v. PP [1990] 1 CLJ 915; [1990] 2 CLJ (Rep) 165 HC ***(refd)***
Khua Kian Keong And Another v. PP [2003] 4 SLR(R) 526 ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***
Munshilal v. State of MP [1960] MPLJ 13 ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Narain And Others v. State of Punjab [1959] AIR SC 484 ***(refd)***
Periasamy v. PP [1965] 1 LNS 129 FC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Abdul Razak Johari [1990] 1 LNS 87 HC ***(refd)***
PP v. Chew Yoo Choi [1989] 1 LNS 158 HC ***(refd)***
PP v. Kasmin Soeb [1974] 1 LNS 116 HC ***(refd)***
PP v. Mohd Fazil Awaludin [2009] 2 CLJ 862 HC ***(refd)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC ***(refd)***
PP v. Rajandiran Kadirveil [2002] 1 LNS 234 HC ***(refd)***
PP v. Tai Mei Yuen [2004] 1 LNS 442 HC ***(refd)***
Rags v. Magistrates Court (Vic) and Another [2008] 2 VSC 1 ***(refd)***
Ram Prakash Das v. Anand Das And Others [1916] AIR 256 PC ***(refd)***
Rameshwar Singh and another v. Bajit Lal Pathak And Others [1929] AIR 95 PC ***(refd)***
Tan Hun Wah v. PP And Another Appeal [1994] 2 CLJ 180 SC ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***
TS Murugesam Pillai v. MD Gnana Sambandha Pandara Sannadhi And Others [1917] AIR 6 PC ***(refd)***
Yusoff Kassim v. PP [1992] 1 LNS 31 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 422, 51A
Dangerous Drugs Act 1952, s. 39B(1)(a), (2)
Evidence Act 1950, s. 114(g)

For the appellant/accused - Azizzul Shariman Mat Yusoff; M/s Azizzul & Ariff
For the respondent/prosecution - Shoba Venu Gobal; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-141-2008]

Reported by Kumitha Abd Majid

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] The High Court Judge convicted the appellant for trafficking in dangerous drugs, to wit, 8,253.7g of ketamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") and punishable under s. 39B(2) of the DDA, and sentenced him to

death. Aggrieved, the appellant now appeals to this court. The amended charge as per exh. "P26" framed by the prosecution reads as follows:

> Bahawa kamu pada 3 Ogos 2008 jam lebih kurang 3.00 petang di lobi Hotel Sunway Resort & Spa, Persiaran Lagoon, Bandar Sunway, Petaling Jaya, di dalam daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah didapati memperedarkan dadah berbahaya iaitu sejumlah berat 8253.7 gram Ketamine, dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The Factual Matrix Of The Case

[2] ASP Loi Yew Lik (PW3), the complainant in the case, received an information pertaining to a drug trafficking activity on 3 August 2008 at 12pm concerning one male Chinese that would take place at the Sunway Resort & Spa Hotel (hereinafter referred to as the "said Hotel"). PW3 then briefed his police personnel pertaining to the information which he received and together, they all proceeded to the said hotel.

[3] On arrival at the said hotel, PW3 and his police personnel took up ambush positions. PW3 stationed himself alone near the valet parking area in his motorcar Toyota Vios. While Lance Corporal Samsuri bin Sujono (PW7) and Lance Corporal Norshila were stationed in the security guard's room of the said hotel.

[4] At about 3pm, PW3 saw the appellant arrived at the said hotel driving a Volvo motorcar bearing registration number WDV 8968. The Volvo motorcar stopped right in front of the said hotel and PW3 saw the appellant, who was alone, alighted from the driver's seat and opened the back door, behind the driver's seat, and removed a black bag using the appellant's right hand. At this juncture, before PW3 got out of his Toyota Vios motorcar, he spoke to his police personnel *via* walkie talkie and told them not to take any action and to let him (PW3) conduct the arrest of the appellant. Still keeping an eye on the appellant, PW3 also saw the appellant carried the black bag in his right hand and walked towards the lobby of the said hotel. PW3 followed suit and approached the appellant and held the appellant's shoulders and introduced himself as a police officer. At that point of time, the appellant was still holding onto the black bag in his right hand. PW7 and Lance Corporal Norshila arrived and PW3 brought the appellant into a room marked as "staff door".

[5] Inside the staff room, PW3 again introduced himself as a police officer to the appellant and showed him his authority card and read the caution to the appellant. According to PW3, the appellant kept silent and looked shocked. PW3 then examined the black bag in the presence of the appellant and found that it was zipped up but not locked. PW3 opened the black bag and found ten packages wrapped in Chinese newspapers which was filled with white powder suspected to be drugs. In due course, the government chemist by the name of Maimonah binti Sulaiman (PW1) analysed the white powder and confirmed that it was ketamine, weighing 8,253.7g, a dangerous drug listed in the first schedule to the DDA.

The Defence Of The Appellant

[6] That on 2 August 2008 at about 2pm, the appellant received a telephone call from a friend by the name of Ah Fatt who invited him for a drink in Puchong in a shop called Ta Sa Ein. After drinking, Ah Fatt requested the appellant to send him to the said hotel because he wanted to stay there. The appellant obliged and brought Ah Fatt to the said hotel. On arrival at the said hotel, the appellant and Ah Fatt alighted from the motorcar and Ah Fatt took the bag from the back of the said motorcar. Both of them then entered the said hotel. When they were about to enter the said hotel, a group of people came from the front and at the same time, Ah Fatt threw the bag down and fled leaving the appellant alone. The group of people who came from the front took the bag and arrested the appellant. They identified themselves as police officers. The appellant was then taken to the Puchong Police Station. The key to the motorcar was seized by the police from the appellant and the police told the appellant that the drugs belonged to the appellant. According to the appellant, he told the police that the bag was not his and that the bag belonged to Ah Fatt who fled from the scene. At the police station, the appellant's personal effects like wallet and the handphone were seized by the police. The appellant said that he knew Ah Fatt for about one year when both of them were working together making mosaic tiles. According to the appellant, the names Ah Fatt and Ah Huat refer to the same person. In Mandarin, it is known as "Ah Fatt" while in Hokkien dialect, it is known as "Ah Huat".

[7] Under cross-examination by the prosecution, the appellant testified that he did not know the full name of Ah Huat. The appellant and his friends knew and call him as Ah Huat. The

A appellant was told by Ah Huat that the latter stayed in Malacca. The appellant admitted going to Ah Huat's house on two occasions in Melaka Jaya but the appellant did not know the name of the housing estate. The appellant went to Malacca in Ah Huat's motorcar. The appellant did not know the registration B number of Ah Huat's motorcar. The appellant contacted Ah Huat *via* telephone and the appellant gave Ah Huat's telephone number as 016-9137857.

[8] Again, under cross-examination, the appellant disagreed that C Ah Huat did not exist and that Ah Huat was not with him on that day. The appellant also disagreed that he drove the Volvo motorcar alone and that there was no one else with him. The appellant agreed that when he arrived at the said hotel, he parked the Volvo motorcar in front of the said hotel. But, the appellant D disagreed that as he alighted from the Volvo motorcar he opened the back door, behind the driver's seat. The appellant disagreed that after opening the back door, behind the driver's seat of the Volvo motorcar, he took out a bag. The appellant disagreed that the bag which he was said to have taken out from the Volvo E motorcar was like the one in the photograph. However, the appellant admitted that when he was arrested, he was shocked but he did not sigh ("mengeluh"). The appellant testified that the police only opened the bag but did not take out its contents.

F **[9]** The appellant disagreed that when he was arrested, he was holding the bag. The appellant said that the bag was on the floor. The appellant said that he did not know that PW3 had arrested him by holding his shoulders because at that time the situation was chaotic ("kelam kabut") and that there were a lot of policemen that came from the front.

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[10] Again, under cross-examination, the appellant disagreed that he did not inform the police about Ah Huat's telephone number. But he agreed that the police informed him that the police attempted to telephone Ah Huat but was not successful. The H appellant did not know whether the police succeeded in arresting Ah Huat on the date of the offence. The appellant disagreed that he did not inform PW3 about Ah Huat.

Analysis

I

[11] Before us only one issue was raised. It pertained to the failure of the High Court Judge to realise that without the CCTV footage of the lobby of the said hotel being produced, the defence

was disadvantaged or prejudiced and the truth of the prosecution's case could not be verified. This issue struck at the very core of the prosecution's case.

[12] It was argued that the High Court Judge erred in not invoking s. 114(g) of the Evidence Act 1950 when the prosecution failed to produce the CCTV footage. Some 26 years ago, the scope of s. 114(g) of the Evidence Act 1950 was laid down by Mohamed Azmi SCJ in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, 494, SC in these lucid words:

> It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[13] Under cross-examination, PW3 had this to say about the CCTV footage:

(a) at p. 77 of the appeal record at jilid 1, PW3 testified as follows:

> Ya, pihak security ada beri kebenaran. Lelaki yang memberi kebenaran ialah Encik Rahimi. Saya tidak tahu siapa dia tetapi mungkin dia mempunyai jawatan untuk memberi kuasa. Security manager ialah Encik Rahimi. Saya jumpa dia dalam pukul 2.40 petang. Saya jumpa dia di lobi. Saya yang minta kebenaran untuk guna bilik kawalan. Terdapat CCTV di dalam bilik kawalan. Anggota saya ada teliti pada CCTV, monitor camera, satu di reception di luar dan di kawasan tengah-tengah lobi. Tidak setuju yang monitor camera adalah menyeluruh di lobi. Tujuan letakkan anggota di dalam bilik kawalan CCTV, tapi bila ada nampak kaca cermin, saya suruh Norshila dan Samsuri (sic)(masuk). Saya tidak dapatkan rakaman CCTV pada hari itu. CCTV berfungsi pada hari itu. Saya tidak setuju saya mempunyai kuasa sebagai polis untuk (ambil rakaman) CCTV, saya pernah menjadi Pegawai Penyiasat. Saya tahu saya boleh buat permohonan untuk dapatkan salinan pita rakaman.

(b) at p. 78 of the appeal record at jilid 1, PW3 said:

> Saya tidak pasti samada daripada CCTV boleh lihat di kawasan lobi sepenuhnya.

(c) at p. 79 of the appeal record at jilid 1, PW3 said:

> Saya tidak setuju versi kami adalah berbeza dengan versi CCTV. Saya tidak setuju yang keterangan saya adalah rekaan semata-mata. Saya tidak setuju bahawa rakaman CCTV tidak diambil sebab kandungan di dalamnya adalah berbeza dengan keterangan. Saya tidak pasti samada pita rakaman ada diserahkan kepada pihak polis. Saya tidak setuju yang OKT tidak jinjing beg tersebut. Saya tidak setuju OKT tergamam dan terkejut bila ditangkap.

[14] Under re-examination, PW3 was asked about the CCTV footage and this was what he said:

(a) at p. 80 of the appeal record at jilid 1, PW3 said:

> OKT masuk melalui pintu besar diikuti oleh saya. Rakaman semasa tangkapan tidak mungkin berjaya merakamnya. CCTV hotel tidak boleh merakamkan keseluruhan kawasan hotel.

[15] The security officer of the said hotel was called by the prosecution to testify. He was A Gopi a/l K Acutha Kurup (PW4). PW4 was on duty at the said hotel on 3 August 2008 at 3pm. He narrated that on that day at the lobby, he saw a group of people who gathered there and they identified themselves as narcotics police. At pp. 55 to 56 of the appeal record at jilid 1, under examination-in-chief, PW4 had this to say:

> On 3.8.2008, I started working at 4.00 pm but I came to work at 3 pm to do the briefing. At 3 pm I did my briefing at the control room and when I came down to the lobby and I saw a group of people gathered there and looked suspicious. I approached them and asked where are they going. They showed me their identification and told me that (they were) the Narcotics Police. That person is a male and a Malay. The group comprised 5 to 6 persons, there was a female personnel. They were at the hotel lobby. They were in plain clothes. They want me to give full cooperation and I told them that I had to call the director. They said they were expecting someone and I told them that if they were to do an arrest, do it quietly. After that they caught a Chinese guy and they brought him to (the) service area at the lobby. Before the arrest I was not there but after the arrest, I

went there. When they arrested the suspect I was in the control room and opened the door to the service area. The suspect was aged about 40 years. I saw a bag but not sure what was the colour. I cannot tell what kind of bag. I cannot remember who was carrying the bag. From the control room I saw the police caught the suspect and they took him to the back lane. I cannot remember the suspect.

[16] When shown the sketch plan marked as exh. "ID21" – later converted to exh. "P21", PW4 said that he could remember where the appellant was arrested and PW4 marked the spot where the appellant was arrested as "L4". Looking at exh. "ID21", "L4" is located at the lobby area. Indeed the key to exh. "ID21" was marked as "ID21K" – later converted to exh. "P21K", and it showed that "L4" is the area of the lobby where the appellant was arrested.

[17] PW4 was also shown a stack of photographs marked as exh. "ID20" – later converted to exh. "P20", and he was able to identify the photographs to be that of the said hotel. PW4 identified the photograph number 11 to be the place where the appellant was arrested and that could be seen at p. 283 of the appeal recort at jilid 3. This was what PW4 testified in relation to the stack of photographs (see p. 56 of the appeal record at jilid 1):

Refer ID20 – photos 1-14. These are photos of Sunway Resort Hotel. Suspect was arrested at the place marked L4 in photo 11.

[18] Under cross-examination, PW4 categorically said that the police requested and was given a copy of the CCTV tape. This was what PW4 said at p. 57 of the appeal record at jilid 1:

Yes, there is a control room at the hotel. No, there are no police personnel stationed at the control room. Yes, there is a CCTV at the lobby. Yes after the arrest the police requested for the CCTV tape. Yes the police was given a copy of the CCTV tape.

[19] Again, under re-examination, PW4 confirmed that the CCTV tape was given to the police. This was what PW4 said at p. 58 of the appeal record at jilid 1:

My security officer called me over the walkie talkie and told me that the police had arrested the suspect and it was then I went to the lobby area. I cannot remember to whom the CCTV tape was given but I knew it was given to the police.

[20] After PW4 completed giving his testimony, the High Court Judge was informed by learned counsel that the CCTV was not given to them pursuant to s. 51A of the Criminal Procedure Code ("CPC"). Section 51A of the CPC makes reference to the delivery of certain documents to the appellant by the prosecution and it is still in its infancy stage. It relates to pre-trial disclosure of evidence by the prosecution. If documents are not supplied to the defence in accordance with s. 51A of the CPC, the prosecution is not barred from tendering those documents and the defence may be given time to study those documents (*PP v. Mohd Fazil Awaludin* [2009] 2 CLJ 862; and *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312, FC). It is germane to mention that in the event the prosecution fails to comply with the provisions of s. 51A of the CPC, the prosecution's case would be jeopardised if the trial court refuses to condone the non-compliance by the prosecution of s. 51A of the CPC. And s. 422 of the CPC may not assist the prosecution if the non-compliance to s. 51A of the CPC is material (*Narain and others v. State of Punjab* [1959] AIR SC 484). Be that as it may, the High Court Judge at p. 58 of the appeal record at jilid 1 made the following annotation:

> At this (juncture) learned counsel informed the court that a copy of the CCTV recording (has not been) given to them pursuant to Section 51 A CPC. The defence were made to understand that there was no CCTV recording.

[21] The investigating officer of the case in the person of Inspector Mohana Sundram a/l Vrejenan (PW6), in his examination-in-chief, stated that he did not get a copy of the CCTV from the said hotel. This can be easily explained because he did not ask for the CCTV. At p. 70 of the appeal record at jilid 1, PW6 testified in his examination-in-chief as follows:

> Saya tidak mendapatkan salinan CCTV daripada pihak resort. Saya tidak ada minta tidak diberi oleh pihak security resort.

[22] Under cross-examination, PW7 said that he saw the security camera. But he did not know how many CCTVs were there. Neither was there any reconnaissance ("tinjauan") of the said hotel by PW7. In its original text, this was what PW7 said as seen at p. 88 of the appeal record at jilid 1:

> Di dalam bilik security saya bersama dengan Lans Koperal Norshila. Dalam bilik security saya dalam 25 minit. Pada masa itu ada security sama ada seorang atau 2 orang. Tidak kenal nama

mereka tetapi bangsa India. Kebenaran diperolehi oleh Chief Inspektor Loi dengan pegawai security. Saya nampak kamera security. Saya tidak tahu berapa banyak CCTV. Saya tidak buat tinjauan.

[23] The Director of Security & Safety of the said hotel by the name of Mohamad Ibrahim s/o Gula Kader (PW9) was called by the prosecution and in his examination-in-chief at p. 97 of the appeal record at jilid 1, he categorically said that:

The CCTV is focussed at 32 locations at the hotel and also at the lobby.

[24] Under cross-examination, PW9 said that the police did not record his statement and that he only knew that he would be called as a witness two days prior to giving evidence. At p. 98 of the appeal record at jilid 1, this was what PW9 said about the CCTV:

Yes, the police surveillance, arrest (was) not recorded in the hotel record. Yes, there were 32 channels in the control room manned by the control officer. There is only 1 personnel in the control room and he works in shift. From the sketch plan, the control room is at L2. The CCTVs used are not sold in the market. Yes, we have CCTVs which can capture images at the lobby and cover the entrance lobby. The staff entrance is a door which opens up to a leading area. Yes, my camera can record. Yes, it can be brought to court and can be displayed in court. Yes, the cameras are in good working condition, sometimes malfunction does happen and it would be repaired immediately. Yes, on that day in question the camera was working well. Yes, the presence of people working is captured in the camera. Yes, during that period it was quite a busy day.

[25] In re-examination, PW9 had this to say at p. 99 of the appeal record at jilid 1 in regard to the CCTV:

With regard to the 3 arrests involved narcotics case, where I was involved. In this incident no CCTV recording was given. I have the sole control of the CCTV.

[26] Learned defence counsel then questioned PW9 further in regard to the CCTV, and the response by PW9 was recorded at p. 99 of the appeal record at jilid 1:

As far as I am concerned no application (was) made by (the) police in this case for a copy of the recording of the CCTV. Normally the police will apply but in this case no as it did not

A involve hotel guests. If the police had applied we would give. The request must be made officially by letter. If I am on leave, my deputy will know about it and if there was any request we will assist the police. My deputy is Encik Kamal Hassan.

B **[27]** Not to be outwitted, the Learned Deputy Public Prosecutor who conducted the prosecution before the High Court Judge was given the liberty to question PW9 further. And PW9 had this to say about the CCTV at p. 100 of the appeal record at jilid 1:

C So far there was no request made by the police for a copy of the CCTV.

[28] Further questions were permitted by the High Court Judge. His Lordship recorded the answers to the questions posed by both defence counsel and the Deputy Public Prosecutor in this D way as seen at p. 101 of the appeal record at jilid 1:

Defence Counsel
Defence asked saksi sama ada minta salinan CCTV tapi tidak dibekalkan. Saksi jawab 'Ya'. Permintaan dibuat secara lisan tapi tidak dibekalkan. Permintaan dibuat kepada Gopi (SP4) tapi pada E tarikh seterusnya pengarah (pergi) outstation, dia tidak tahu penyerahan kepada siapa.

DPP
Permintaan dibuat untuk salinan CCTV dibuat kepada Gopi secara lisan dan Gopi kata dia kena rujuk kepada director. Saya tidak F terima apa-apa salinan CCTV.

[29] The importance of the CCTV footage cannot be doubted. It would clear the lingering doubt of whether Ah Fatt carried the black bag and threw it to the floor and bolted at the lobby of the G said hotel leaving the appellant to face the music, so to speak, or it was the appellant who was all alone was seen by PW3 carrying the black bag in his right hand and entering the lobby of the said hotel and was placed under arrest by PW3. Had the CCTV footage being produced, the High Court Judge would be in a H better position to verify the prosecution's version. Bereft of the CCTV footage, the High Court Judge should have invoked the presumption under s. 114(g) of the Evidence Act 1950 bearing in mind "that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it" and I acquitted and discharged the appellant without calling for his defence.

[30] Right from the very start, the importance of the CCTV footage was highlighted by the defence. PW4 was categorical when he testified that the police had requested and was given the CCTV tape. PW9 testified that there were CCTVs focussed at 32 locations at the said hotel and also at the lobby. These CCTVs would surely verify the version of the prosecution if tendered. Yet, not a single CCTV tape was produced and tendered by the prosecution.

[31] The High Court Judge acknowledged that the police had requested for a copy of the CCTV and a copy was in fact given to the police. At p. 246 of the appeal record at jilid 3, His Lordship said:

> SP4 – adalah Pegawai Keselamatan di Sunway Resort – keterangan saksi ini semasa disoal balas oleh pihak pembelaan tertumpu kepada bilik kawalan CCTV di mana beliau mengatakan bahawa tiada anggota polis ditempatkan di bilik kawalan CCTV. Saksi ini juga mengatakan bahawa di kawasan lobi hotel terdapat CCTV dan selepas tangkapan dibuat pihak polis ada meminta salinan CCTV yang mana satu salinan rakaman CCTV telah diberikan.

[32] Contrary to the evidence by PW4, PW9 testified that CCTV recording was not given to the police because there was no written request by the police for a copy of the CCTV. Since the police did not record the statement of PW9, there was no opportunity for the learned Deputy who conducted the prosecution to impeach the credit of PW9. Thus, we have two sets of evidence in regard to the nagging question of whether a copy of the CCTV was given to the police. These two contradictory or variant narratives struck at the very root of the prosecution's case and it must surely benefit the defence (*Yusoff Kassim v. PP* [1992] 1 LNS 31; [1992] 2 MLJ 183; *PP v. Lee Eng Kooi* [1993] 2 CLJ 534; [1993] 2 MLJ 322; *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1; [2007] 4 AMR 709; *Adzhaar Ahmad & Anor v. PP* [1996] 1 LNS 68; [1996] 4 MLJ 85; *PP v. Tai Mei Yuen* [2004] 1 LNS 442; [2004] 4 MLJ 541; *Periasamy v. PP* [1965] 1 LNS 129; [1966] 1 MLJ 138; *Harchand Singh & Anor v. State of Haryana* [1974] AIR 344; and *PP v. Rajandiran Kadirveil* [2002] 1 LNS 234; [2002] 7 MLJ 77).

[33] In our judgment, the non-production of the CCTV footage amounts to a withholding or suppression of evidence and if it was produced, it would be unfavourable to the prosecution and, consequently, the adverse presumption under s. 114(g) of the Evidence Act 1950 must be invoked against the prosecution.

[34] It goes without saying that the non-production of the CCTV footage had disadvantaged or prejudiced the defence and the truth of the prosecution's case could not verified. Indeed in a criminal trial, fairness must be displayed by the prosecution. And the concepts of a fair trial and fairness have been recognised by our Malaysia Courts in *Cheak Yoke Thong v. Public Prosecutor* [1984] 2 CLJ 83; [1984] 1 CLJ (Rep) 87; [1984] 2 MLJ 119; *Goi Ching Ang v. PP* [1999] 1 CLJ 829; [1999] 1 MLJ 507; *Tan Hun Wah v. PP* [1994] 2 CLJ 180; [1994] 1 AMR 113, SC; *Azahan Mohd Aminallah v. Public Prosecutor* [2005] 1 CLJ 374; [2004] 6 AMR 810, CA; and *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129.

[35] In *Brown v. Stott* [2001] SC (PC) 43, [2001] 2 All ER 97; [2003] 1 AC 681, PC, the Privy Council discussed the "equality of arms" principle and described the principle lucidly as "lying at the heart of the right to a fair trial". The Supreme Court of Victoria in *Rags v. Magistrates Court (Vic) and Another* [2008] 2 VSC 1, emphasised the duty of the prosecution to promote fairness in this way:

> (69) The principles of the courts establish that the general duty of a prosecutor is to prosecute and not to defend, but the prosecution 'must be conducted with fairness towards the accused … and with a single view to determining and establishing the truth'. Therefore prosecutors should see themselves as 'ministers of justice'. Their duty is to 'assist the court in the attainment of the purpose of criminal prosecutions, namely, to make certain that justice is done as between the subject and the State'. In performing that function, the prosecutor must act with the objective 'of establishing the whole truth in accordance with procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one'.

[36] Now, s. 114(g) of the Evidence Act 1950 applies to both civil and criminal cases. It operates when a witness is not called (*Chua Kim Suan v. Ang Mek Chong* [1988] 3 MLJ 231; *Eastern & Oriental Hotel [1951] Sdn Bhd v. Ellarlous George Fernandez & Anor* [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50; [1989] 1 MLJ 35; *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 CLJ

9; [1991] 1 CLJ (Rep) 155; [1991] 1 MLJ 33, SC; *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 2 MLJ 16, SC; *PP v. Chew Yoo Choi* [1989] 1 LNS 158; [1990] 2 MLJ 444; and *Jazuli Mohsin v. PP* [1990] 1 CLJ 915; [1990] 2 CLJ (Rep) 165; [1990] 2 MLJ 190), or in a situation, like the present case, where the CCTV footage which is a piece of material evidence has not been produced. A classic example would be the case of *PP v. Abdul Razak Johari* [1990] 1 LNS 87; [1991] 1 MLJ 105, where an adverse inference was drawn against the prosecution for its failure to produce the first information report.

[37] The law books are replete with authorities in regard to the failure of the prosecution to tender material documents which attracted the invocation of s. 114(g) of the Evidence Act 1950. For a start, reference is made to the case of *Munshilal v. State of MP* [1960] MPLJ 13, where a prosecution under the Suppression of Immoral Traffic in Women and Girls Act 1956 was initiated and the prosecution failed to produce the list of prostitutes, a presumption was invoked against the State. Next, is the case of *Harjit Singh Mann v. S Umrao Singh and others* [1980] AIR 701 which concerned an election petition under the Representation of the People Act 1951 where the allegation was that the nomination paper was filed late and on non-production of the receipt showing the date and time of the presentation of the election petition, the court was justified in drawing an adverse inference against the petitioner. And, finally, in a string of cases (*TS Murugesam Pillai v. MD Gnana Sambandha Pandara Sannadhi and others* [1917] AIR 6; *Ram Prakash Das v. Anand Das and others* [1916] AIR 256; and *Rameshwar Singh and another v. Bajit Lal Pathak and others* [1929] AIR 95), the Judicial Committee strongly condemned the practice of the parties to a suit withholding from the court, evidence which may throw light on the points for determination.

[38] Illustration (g) to s. 114 of the Evidence Act 1950 is based on the *maxim omnia praesumuntur contra spoliatorem* (if a man wrongfully withholds evidence, the court can draw every presumption to his disadvantage, consistent with the facts admitted or proved). It must be borne in mind that the best evidence rule governs the production of evidence in court and when the best evidence is withheld, it is only fair to presume that the party withholding the evidence had some ulterior motive in not producing it and if produced, would be detrimental to that party, and that attracted the adverse inference provision.

[39] At the end of the prosecution's case, the High Court Judge accepted the version of the prosecution as credible notwithstanding the fact that the CCTV footage was not tendered and the two contradictory or variant narratives of PW4 and PW9 in regard to the CCTV footage introduced two sets of evidence for the prosecution. To compound the matter further, PW3 testified that PW7 and Lance Corporal Norshila were stationed in the security guard's room of the said hotel and according to PW3, in that room, there was a small glass window that could see outside. At p. 40 of the appeal record at jilid 1, in examination-in-chief, PW3 testified in this way:

> Di dalam bilik itu ada satu tingkap cermin yang boleh nampak luar.

[40] PW3 also testified in examination-in-chief that in the security guard's room where he was located together with Lance Corporal Norshila, there were windows that could see outside. At p. 83 of the appeal record at jilid 1, PW7 said:

> Selepas itu ... saya dan Norshila dibawa masuk ke bilik security di mana di kawasan pejabat security terdapat cermin-cermin yang boleh lihat di luar kawasan hotel.

[41] And from where he was located, PW7 testified that he could see the appellant walked towards the lobby of the said hotel while carrying a bag in his right hand. And at the same time, PW7 saw PW3 followed the appellant from behind. In its original text, this was what PW7 testified in examination-in-chief at p. 83 of the appeal record at jilid 1:

> Semasa pemerhatian pada jam lebih kurang 3.00 petang saya nampak seorang lelaki Cina berjalan kaki menghala ke lobi hotel tersebut sambil menjinjing satu beg di tangan sebelah kanan. Dalam masa sama saya nampak Chief Inspektor Loi mengekori lelaki Cina dalam 10 ke 15 meter.

[42] PW9 were shown some photographs when he testified. In relation to the "security guard's room" of the said hotel where PW7 and Lance Corporal Norshila were located, PW9 referred to that room as the "control room". According to PW9, at p. 97 of the appeal record at jilid 1, during examination-in-chief:

> There is no window in the control room.

[43] Without any window in the control room (security guard's room) how could PW7 see what transpired outside the room. The only way to verify PW7's version would be to see the CCTV footage which, unfortunately, was not tendered by the prosecution and that, in our judgment, weakened the prosecution's case at the very outset. In our judgment, the defence of the appellant should not be called and he should be acquitted and discharged without his defence being called. The learned High Court Judge in his analysis of the evidence adduced by the prosecution and the defence had this to say at pp. 262 to 263 of the appeal record at jilid 1:

> Pihak pembelaan juga menimbulkan isu percanggahan keterangan di antara saksi-saksi pendakwaan yang menjejaskan kredibiliti mereka. Di antara percanggahan yang ditimbulkan ialah tentang sama ada terdapatnya tingkap di bilik sekuriti yang membolehkan saksi pendakwaan SP7 dan Norshila melihat OKT masuk menuju ke bahagian lobi hotel. Keterangan SP9 pula mengatakan di bilik sekuriti tidak ada tingkap yang membolehkan SP7 dan Norshila melihat kelibat OKT apabila masuk ke hotel. Pada pendapat Mahkamah percanggahan yang timbul bukanlah material sehingga menjejaskan kes pendakwaan, kerana yang relevan ialah terdapatnya keterangan daripada saksi pendakwaan (SP3) yang OKT ditahan seorang diri di lobi hotel bersama dengan beg ekshibit P9 bersamanya.

[44] It is apparent that His Lordship merely shut his eyes to the obvious and ignored the fact that the testimony of PW7 was highly suspect because there was no window in the control room (security guard's room) which would allow PW7 to see the appellant carrying the bag in the appellant's right hand while walking towards the lobby of the said hotel. The versions of PW3 and PW7 could easily be verified if the CCTV footage was tendered by the prosecution. Yet, in the absence of the CCTV footage, the High Court Judge made a finding of fact that the appellant had possession of the bag and knew the contents of the bag to contain the drug ketamine. At p. 263 of the appeal record at jilid 3, the High Court Judge said:

> Mahkamah mendapati bahawa OKT mempunyai milikan, kawalan dan milikan terhadap beg ekshibit P9 serta kandungan dadah di dalamnya. OKT semestinya mempunyai pengetahuan tentang kandungan dadah ketamine di dalam P9 semasa ditangkap.

[45] Two observations must be made here. Firstly, when the prosecution evidence admits two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused (*Tai Chai Keh v. PP* [1948] 1 LNS 122; [1948] Supp MLJ 105; and *PP v. Kasmin Soeb* [1974] 1 LNS 116; [1974] 1 MLJ 230). Secondly, appellate intervention is called for when the inferences by the trial court were not supported by the weight of evidence. In this context, the speech of Yong Pung How CJ (Singapore) in *Khua Kian Keong and another v. Public Prosecutor* [2003] 4 SLR(R) 526, at p. 531 should be referred to. There, His Lordship aptly said:

> Principles of appellate intervention
> 13 It is beyond dispute that an appellate court will be slow to overturn findings of fact by the trial judge especially when an assessment of the credibility and veracity of the witnesses has been made: *Ang Jwee Herng v. PP* [2001] 1 SLR(R) 720 and *PP v. Hendricks Glen Conleth* [2003] 1 SLR(R) 426. I reiterated the requirements for appellate intervention in *Ang Jwee Herng* (at (62)). The trial judge's decision must be 'plainly wrong or against the weight of the objective evidence before the court'.
>
> 14 If however the trial judge's assessment of a witness' credibility was based not so much on his demeanour as a witness, but on inferences drawn from the content of his evidence, the appellate court is in as good a position as the trial court to assess the same material: *Awtar Singh s/o Margar Singh v. PP* [2000] 2 SLR(R) 435. The appellate court might not be in a position to assess the witness' demeanour, but it should not refrain from evaluating the conclusions of the trial judge based on all the facts known to him. The Court of Appeal in *Bala Murugan a/l Krishnan v. PP* [2002] 2 SLR(R) 420 (at (21)) provided another expression, namely that interference is justified when 'inferences drawn by the trial court were found to be not supported by the primary facts on the record'. I had summed up this principle in *Sahadevan s/o Gundan v. PP* [2003] 1 SLR(R) 145 (at (17)):
>
> > Nevertheless, while an appellate court should be reluctant to interfere with a finding of fact, it is always free to form an independent opinion about the proper inference to be drawn from a finding of fact.
>
> 15 My view is that the inferences drawn by the trial judge, independent of his observation of demeanour, were incorrect. These errors had led to convictions that were against the weight of the evidence. It was highly questionable to me whether the Prosecution's case was proven beyond a reasonable doubt.

[46] There was also confusion in regard to the registration number of the Volvo motorcar. This was acknowledged by the High Court Judge in his written grounds of judgment at p. 248 of the appeal record at jilid 3. There, His Lordship said:

> (iii) Nombor pendaftaran dan jenis kereta yang dipandu oleh OKT: Di dalam soal utama SP3 dikatakan telah mengatakan bahawa 'Pada pukul 3 petang suspek tiba di tempat kejadian menaiki sebuah kereta Volvo dipandu oleh seorang lelaki Cina. Nombor pendaftaran ialah WDV 8968. SP6 pula berkata beliau terima barang kes sebuah kereta Volvo nombor pendaftaran WDD 8984. Manakala SP6 berkata yang beliau telah memohon carian rasmi JPJ terhadap kereta tersebut dan telah terima sesalinan dokumen pendaftaran untuk kereta nombor pendaftaran kereta Volvo WDD 8968.

[47] The two photographs at p. 285 of the appeal record at jilid 3 showed the Volvo motorcar and the registration number as WDB 8968. As police officers, PW3 (the arresting officer) and PW6 (the investigating officer) should have read their statements before they gave evidence. In this way, simple mistakes could be avoided.

Conclusion

[48] We listened attentively to the submissions of the parties on both sides and in open court, we announced our decision as follows:

> Unanimous decision. Bereft of the CCTV recording, the case for the prosecution collapsed like a deck of cards, so to speak. There was evidence adduced by the prosecution that a copy of the CCTV recording was handed over to the police and yet the prosecution did not tender that particular CCTV recording as an exhibit. Therefore, in the circumstances, section 114(g) of the Evidence Act 1950 should be invoked against the prosecution. In our judgment, the prosecution failed to prove its case beyond reasonable doubt. The law is no respector of persons and the law must be applied across the board to everyone. Accordingly, we allow the appeal of the appellant. We set aside the conviction and sentence imposed by the High Court. We set the appellant free.

[49] We are grateful to the parties on both sides for assisting us in arriving at a just decision.